

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. OSH 2003-2 |
| |) | |
| VERNON Y. YAMADA, |) | DECISION NO. 5 |
| |) | |
| Complainant, |) | FINDINGS OF FACT, CONCLUSIONS |
| |) | OF LAW, AND ORDER |
| vs. |) | |
| |) | |
| FOUR SEASONS RESORT HUALALAI, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | |
| DIRECTOR, DEPARTMENT OF LABOR |) | |
| AND INDUSTRIAL RELATIONS, |) | |
| |) | |
| Appellee. |) | |
| _____ |) | |

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest filed December 17, 2002 by Complainant VERNON Y. YAMADA (YAMADA).

On February 18, 2003, FOUR SEASONS RESORT HUALALAI (FSRH or Employer) filed Respondent Four Seasons Resort Motion to Dismiss Complainant's Appeal. The Employer contends that YAMADA did not timely file a notice of contest within the period established by Hawaii Revised Statutes (HRS) § 396-11.

On March 19, 2003, the Board held an initial conference by conference call attended by FSRH's counsel, the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS' (Director) counsel and YAMADA appearing, pro se, by telephone. Pursuant to a Pretrial Order, Order No. 38, dated March 19, 2003, the Board continued the hearing on FSRH's motion to dismiss to April 17, 2003 unless earlier withdrawn and determined the issue to be "whether Respondent FOUR SEASONS RESORT discriminated against Complainant Yamada because of safety related complaints allegedly made by him?"

By letter dated March 24, 2003, FSRH withdrew its Motion to Dismiss without prejudice, and reserved the right to argue that YAMADA's appeal was untimely.

The Board commenced the trial in this matter on June 3, 2003. The hearings continued on June 4, June 6, June 19, June 20, 2003, with a status conference on June 26, and July 30, 2003. The parties were afforded full opportunity to present evidence and argue their respective positions. After a thorough review of the records in the case the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. YAMADA was employed as an Engineer I by FSRH from August 26, 1996 and was, for all times relevant, an employee within the meaning of HRS § 396-3.
2. FSRH is a hotel in Kailua-Kona, Hawaii and an employer within the meaning of HRS ' 396-3.
3. YAMADA was responsible for maintaining FSRH's laundry equipment, including the transfer of perchloroethylene (PERC).
4. PERC is a liquid chemical solvent used in connection with dry cleaning. The MSDS describes the potential health effects of the chemical, first aid, firefighting measures, accidental release measures, handling and storage, exposure controls/personal protection, physical and chemical properties, stability and reactivity, toxicological information, ecological information, disposal considerations, transport information and regulatory information. PERC's MSDS contains the following "Emergency Overview:"

Colorless liquid. Irritating Odor. Toxic fumes released in fire situations. Causes skin irritations. Harmful if inhaled. Can cause death if too much is breathed. Clear all personnel from area. Wear full protective equipment. Contain liquid to prevent contamination of soil, surface water or ground water. Respondent's (R's) Exhibit (Ex.) 60.

5. In the job YAMADA held prior to his hiring at FSRH, he was required to work with PERC and he had received training in its hazards, management and handling. Therefore, YAMADA believed that his work with PERC at FSRH was hazardous to his health, as well as to anyone else who came into contact with this chemical.

6. Upon being hired at FSRH and assigned to the laundry valet departments in 1996 he observed deficiencies in safety precautions regarding PERC and began working with Ken Finnegan, the then chief engineer, and Dennis Chaffer, the then assistant laundry manager, to research appropriate precautions and procedures.
7. Britt Tuscher (Tuscher) assumed the job of Director of Engineering in 1998. Damien Souza (Souza), Assistant Director of Engineering, was YAMADA's immediate supervisor. YAMADA was assigned as a laundry mechanic, the only mechanic assigned full time to the laundry and accordingly the employee most exposed to, and required to handle PERC.
8. Upon assuming the job, YAMADA took his concerns with PERC safety to Tuscher and Souza. He claims that he complained to them about 1) the lack of policies, procedures and training, 2) the absence of pumps or personal protective equipment, and 3) the lack of monitoring devices to detect any hazard. For example, his job required him to transfer PERC from a 55 gallon drum to a dry cleaning machine periodically throughout the year. The lack of a proper pump necessitated his starting the siphoning the chemical by sucking on a pipe. YAMADA's lack of personal protective equipment also necessitated his jury rigging gear with plastic bags.
9. YAMADA claims these complaints together with corresponding requests for the purchase of necessary equipment were repeatedly ignored, denied or deferred by Tuscher, who allegedly observed the danger and exposure.
10. Frustrated with his lack of progress, YAMADA says he took his concerns regarding PERC safety to Helene Birchfield (Birchfield), a FSRH safety and security officer in October 1999. Birchfield advised YAMADA to continue to work with his supervisors.
11. On December 10, 1999, YAMADA received an annual review score of 176 for the review date of August 26, 1999. This was a rating of "Meets Standard." His Supervisor's comments included, "Vernon has a good overall handle on the maintenance of our laundry equipment. We would like to see Vernon focus in on finish details i.e. excess grease, unsecured electrical panels, etc." R's Ex. 2.
12. YAMADA asked Birchfield, to actively intervene around the Spring of 2000. Birchfield then independently conducted her own research to confirm YAMADA's concerns and took her conclusions, which mirrored YAMADA's, to Souza. She also communicated YAMADA's PERC concerns to her supervisor Director of Security Amy Conroy (Conroy). During the course of

the next year she periodically asked Souza about the progress of the PERC safety program. She received no positive response except for Souza's saying three or four times, "Oh Vernon again."

13. On June 14 and 15, 2000, YAMADA called in to his supervisor that he would be absent due to a "family situation." R's Ex. 3.
14. On June 29, 2000, YAMADA was due to report to work at 11:30 p.m. but reported to work late. He notified security that he would be late and the reason for the tardiness was that he overslept. R's Ex. 3.
15. On August 21, 2000, YAMADA was due to report to work at 11:30 p.m. but reported to work late because he overslept. He did not notify his supervisor. R's Ex. 4.
16. On October 3, 2000, Souza and Tuscher conducted an inspection of the laundry as a followup on issues discussed previously and specifically on September 19, 2000. In an e-mail to Melody Mahiko (Mahiko), Assistant Director of Human Resources, Tuscher reported, in part:

...These issues are related to overall safety of Laundry staff. Vern was instructed to ensure all laundry equipment electrical panels and belt pulley panels are secured tight with tools to prevent laundry staff from opening the panels by hand and possibly getting injured. We discussed how the laundry staff have (sic) seen Engineers inside the cabinet to reset a motor overload after a towel gets jammed and shuts down the machine, and that they may attempt this procedure. In addition the importance of removing lint from the equipment to prevent failures and the possibility of spontaneous combustion.

During the inspection the following was found: Braun washer #4 electrical panel was missing the top bolt and bottom bolt was finger loose. #5 washer also had loose bolts on electrical panel. The ironer right hand door was not secured and was able to open (sic) without tools. In addition the two safety switches were bypassed with tape. This same condition was also found on the small piece folder and the spreader feeder.

These conditions have been discussed with Vern on Weds. (sic) the 4th. He has been told that this is a written warning and that he is responsible for checking all of the laundry equipment.

Vern was also counseled on the overall condition of the laundry equipment. He has been advised that we need to see an improvement of the spare parts cabinet, grease and lint needs to be cleaned off machines and preventive maintenance sheets need to be completed in a timely manor (sic). We have asked Vern to pick it up. R's Ex. 5.

17. Birchfield brought YAMADA's safety concerns to Marsh Company representatives who were conducting an audit of risk management at FSRH on or about December 4, 5, and 6, 2000.
18. By letter and a report of Risk Control Audit Recommendations dated December 18, 2000, the Marsh Company notified General Manager Kathleen Horrigan (Horrigan) of its findings and recommendations. Included in this report are recommendations on PERC. R's Ex. 41. These findings and recommendations were assigned to a number of individuals for follow-up. A number of documents were introduced to show the follow-up done by FSRH.
19. For YAMADA's 4:00 a.m. shift on January 30, 2001, YAMADA called security at 3:55 a.m. that he would be absent due to his car breaking down on his way to work. R's Ex. 6.
20. In the Spring of 2001 Birchfield communicated YAMADA's concerns to her manager Conroy and the FSRH Planning Committee, of which both Tuscher and Conroy were members and which was in the process of preparing responses to the annual safety audit conducted by their safety consultant, the Marsh Company. Conroy assured Birchfield that the PERC concerns were communicated to the planning committee.
21. On March 8, 2001, Birchfield submitted a Safety Program Proposal listing tasks, departments, requirements and training comments with respect to the Marsh recommendations, including recommendations related to PERC. R's Ex. 45.
22. On March 12, 2001, the Planning Committee prepared the Marsh Action Plan 2000 which listed concerns, action/correction, persons and dates with respect to the Marsh recommendations, including the recommendations relating to PERC. R's Ex. 46.
23. On April 22, 2001, YAMADA called security at 11:03 p.m. to notify his supervisor that he was sick and would not report for his shift beginning at 4:00 a.m. on April 23, 2001. R's Ex. 6.

24. On April 28, 2001, Birchfield sent Conroy a letter explaining that she was “totally frustrated with the whole safety program issue and asking her to explain why I should not write a letter to HIOSH.”
25. Mahiko issued a memo dated May 28, 2001 to all employees on the Excessive Absenteeism Policy. Effective June 1, 2001, the revised policy separated sick leave/unexcused absence (i.e., no transportation, no child care, etc. from tardy.) The policy provided, in part:

Excessive Absenteeism - Sick Leave/Unexcused Absence Policy
Employees will be subject to discipline if they are absent from work excessively irrespective of the reasons for the absences or if the reasons are legitimate or not. We have defined “excessive” as 4 or more incidents during the last 12 month period (not calendar year). An incident is counted as one regardless of the actual length of the absence. A sick call for one month or one day is one incident. An incident counts whether or not an employee receives sick pay or brings in a legitimate doctor’s note.

Excessive Absenteeism - Tardy Policy
Employees will be subject to discipline if they have excessive tardiness. We have defined “excessive” as 3 or more incidents of tardiness during the last 12 month period (not calendar year). An incident counts whether or not the reason for tardiness is legitimate.

* * *

In all aspects of attendance, it is at the discretion of Four Seasons Resort Hualalai to determine the appropriate disciplinary action.

EXPLANATION OF THE POLICY

number (sic) of incidents in both cases will be based on a rolling twelve month period. When an employee’s record is “excessive” in a rolling 12 months period, (4 for sick/excessive absenteeism and 3 for tardy) a verbal warning would be issued. If the employee has another incident and they again have an “excessive” number of incidents on record, progressive discipline would be a written warning. If at the time the employee does not reach the “excessive” number of incidents, no discipline would be warranted. (this would occur if previous incidents “drop off” the employee’s record.)

* * *

R's Ex. 8.

26. Birchfield wrote a memo to Mahiko about safety concerns, including concerns raised by YAMADA about PERC, dated June 21, 2001 and left it in the employee suggestion box. The paragraph entitled Perchloroethylene Program reads as follows:

Also concerned that there is no written program to support training for exposed employees (Laundry & Engineering), including on-site response team (Engineering & Security) that may be asked to do an initial survey to identify a potential spill hazard. Storage of the drums and used filters has been addressed as a concern outside Laundry (closely stacked with other non-hazardous materials and combustibles, employee traffic and blocked access to the drums). This is a serious hazard that could threaten physical harm and, due to the chemical, pose imminent danger. R's Ex. 49.

27. On July 5, 2001 YAMADA attended a PERC manufacturer's training session from 9:00 a.m. to 11:00 a.m. R's Ex. 34. YAMADA complained to his supervisors about problems in the training that was conducted.
28. Therese Glowania (Glowania), Director of Human Resources, wrote a memo dated July 6, 2001 to Conroy for follow-up. The memo stated, in part:

As these concerns potentially expose us to an OSHA complaint/inspection, I need for you to give this your utmost attention by personally looking into each of her concerns to determine if we are in compliance as well as providing your recommendations for a plan of action as you feel necessary.

29. On July 10, 2001, YAMADA was scheduled to begin at 4:00 a.m. YAMADA called security at 3:11 a.m. to report his absence due to car trouble. R's Ex. 10.
30. In an Advisory Notice dated July 10, 2001 Souza issued a "verbal warning" to YAMADA stating:

You are in violation of Workrules & standards (sic) of Conduct, Category Two, Item One: "Frequent absence or tardiness, or abuse of the sick pay policy. Failure to properly notify your

supervisor of your absence.” You have been sick on three occasions (September 27-28, December 4-12, 2000 and April 23, 2001) and called in with car trouble on two occasions (January 30 and July 10, 2001). This is considered excessive absenteeism. Future absences will result in progressive disciplinary action. R’s Ex. 9.

31. YAMADA was late for his 7:30 a.m. shift on July 20, 2001 because he overslept. He reported to work at 10:17 a.m. YAMADA did not notify his supervisor in advance of his tardiness. YAMADA was issued a written verbal warning. R’s Ex. 10a.
32. By memo dated July 21, 2001, Bob Toman, Braun dry cleaning machine representative, notified Tuscher of a number of equipment repairs that are needed to be made to maintain the equipment. This was transmitted by Tuscher to Souza and then to YAMADA with completion dates. R’s Ex. 14. On August 13, 2001, Tuscher wrote:

Please address these issues with Vernon. Give him a reasonable deadline to have the items completed. Document the assignment. Also please do a spot check of the safety switches. He was warned of this previously and is a serious concern.

Souza discussed the repairs and set the completion dates. R’s Exs. 16 and 17.

33. In response to Birchfield’s suggestion box memo of PERC concerns, Glowania, on July 26, 2001, wrote that with respect to the PERC Program, “We expect this program being in place by month-end with in-house training scheduled for 7/26-7/27/01.” R’s Ex. 53.
34. The FSRH subsequently conducted Perchloroethylene Procedures Training on July 27, 2001, which supplemented the previous manufacturer’s training on July 5, 2001. According to a Perchloroethylene Procedures Training Acknowledgment, YAMADA attended a training program for PERC conducted by Gilbert Tavares, Jr. During the training the MSDS for Perchloroethylene was distributed and attendees acknowledged:

All the Hazards of this chemical, the safety equipment required or recommended and the procedure for the safe handling of Perchloroethylene including the clean-up of small spills have been covered. R’s Ex. 35.

35. On July 31, 2001, YAMADA was not clean shaven when he appeared for work and was counseled by Tuscher as to the grooming policy. R's Ex. 11.
36. On August 8 and 9, 2001, FSRH provided YAMADA and other employees Confined Space Training/Respirator Training/ Hearing Conservation/Respirator Fit Testing.
37. On September 12, 2001, FSRH provided YAMADA and other employees Respirator Fit Testing.
38. YAMADA was late for his 4:00 a.m. shift on September 19, 2001. No reason was noted and YAMADA reported for work at 4:44 a.m. R's Ex. 18.
39. On October 3, 2001, Tuscher checked the laundry and found a number of discrepancies. These were noted in a memo to Souza with a note that YAMADA should be counseled and disciplinary action taken.
40. YAMADA was late for his 4:00 a.m. shift on October 10, 2001 because he woke up late. He reported at 4:32 a.m. R's Ex. 18.
41. By an Advisory Notice dated October 10, 2001 YAMADA was issued a verbal warning on excessive absenteeism. R's Ex. 20. YAMADA was advised that future incidents would result in progressive disciplinary action. The attendance chart attached recorded tardiness on July 20, 2001, September 19, 2001, and October 10, 2001.
42. By an Advisory Notice dated October 12, 2001, YAMADA was issued a "Final Written Warning" for the discrepancies in his work performance and attendance. The notice states:

Final Written Warning. Any further violations of any nature will result in termination of employment.

Vernon has been advised that a marked improvement in performance is needed ASAP. Vernon is to keep a (sic) accurate account for his time in the Log book. R's Ex. 21.

43. The sheet attached to the October 12, 2001 Advisory Notice stated:

Incident #1.

Vernon failed to follow Britt Tuchers (sic) directions when instructed to purchase a direct replacement 120 volt solenoid coil for the laundry 250# waster #5. Instead Vernon purchased a

new retrofit unit which resulted in a 3-week equipment down time. September 10th - 3rd.

Incident #2.

Oct. 1st Britt came in early and did an inspection on the Laundry and discovered Vernon working wearing slippers. When questioned, Vernon stated “that Housekeeping was waxing the floors in the mens (sic) locker room and was unable to get his shoes”.

Incident #2. (sic)

On Oct. 3rd Britt Tuscher made an inspection in the Laundry around 3:30 a.m. Prior (sic) to Vernon starting his shift. The following was found/observed: (Pls. See memo dated 10/3/01 to Damien Souza) Issue pointed out were (sic) item #3. Spreader feeder has two incorrect size bolts without nuts on right size (sic) lifting lever. Issue pointed out to Vernon on 10/1/01 and still not completed.

Tag & Lock-out procedures not followed, See attached photo. Exhibit A. Serious safety violation. (Training completed on 6/12/01 (sic) Exhibit B.

Incident #3.

On Oct. 10th. Vernon reports to work 30 minutes late, didn't discussed (sic) with Britt or Damien and stays late to make up the loss (sic) time. Not knowing how late he was he worked 45 minutes extra creating 15 minutes overtime. Inquiring this with Vernon he stated, “that his head is not on straight.”

Violations

Category One:

#13. Refusal or failure to perform assigned work or follow a Supervisor's instructions, or any act of insubordination. Any employee feeling that an instruction from a Supervisor is unfair or unjust should first perform the task and then Later (sic) discuss their concerns with their Supervisor and/or follow the problem solving procedure found under C.A.R.E.

Category Two

#3. Failure to cooperate with reasonable requests to work or job assignment satisfactorily.

#18. Causing injury to another employee or guest, or any act of excessive careless or negligence which results in a potential or real loss or damage to myself, another employee, the resort or a guest. R's Ex. 21.

44. On October 15, 2001, Tuscher and Souza walked through the laundry and found:

On Monday 10/15/01 at 12:15 p.m. both Britt Tuscher and myself made a routine laundry walkthru (sic). We discovered that two parts cabinets behind washers one and two was (sic) left unlocked. Vernon left at noon. Washer #1 electrical panel is unlocked/not secured. We also noticed that a butter knife was placed on top of the washer. After inquiring with the wash man we discovered that the butter knife was used to open the door to washer #1. This has been reported a number of times and not corrected, (per wash man).

After speaking to Vernon on Thursday 10/11/01 morning regarding a request made by Britt Tuscher on 10/1/01, incorrect bolts without nuts on laundry spreader as a reminder; this still isn't done. R's Ex. 28.

45. On October 18, 2001, Tuscher told YAMADA that they were concerned about his statement that he was not of his right mind. Tuscher expressed concern and offered the Employee Assistance Program (EAP). YAMADA went into details of some personal problems. Tuscher said that could be reason for his poor performance and that he needed for him to schedule an appointment with EAP. YAMADA said he would. R's Ex. 29.
46. On October 23, 2001, YAMADA was issued a "written warning" for an October 3, 2001 inspection by Tuscher and Souza where discrepancies were found.
47. On October 25, 2001, YAMADA had been required to perform a blowdown which did not occur or was not thoroughly completed. R's Ex. 30.
48. On October 30, 2001, YAMADA was given an annual performance review for the period covering up to August 26, 2001. YAMADA's score was 127 which "Meets Standard." His Supervisor's comments were: "Vernon needs to

concentrate on all laundry equipment and keep them operating up to Four Seasons standards. He also needs to complete all tasks in a timely manner.” R’s Ex. 21.

49. In a document dated October 31, 2001, FSRH issued its “Marsh Action Plan 2000” for the audit conducted December 2000. The Action Plan confirmed that the actions taken with respect to all of the Marsh recommendations related to PERC were either ongoing, done or completed. Under the column labeled “Concerns,” the item which contained the greatest number of enumerated concerns was 00-27 which reads:

The following items pertain to dry-cleaning operation.

Ensure workers are trained in the safe operating procedures for the dry-cleaning machine including operation, cleaning and maintenance.

Consider posting the safe operating procedures from the manufacturer near the machine for easy reference.

Employees must be monitored for exposure to perc at least annually.

Ensure workers wear respirators for activities such as clearing lint trap, replacing filters, adding perc etc.

The perc sensor should be located down at floor level since the vapors are heavier than air.

Local exhaust ventilation should be extended over the spot remover area, to remove vapors from the spot cleaning of chemicals. R’s Ex. 59.

50. The independently developed institutional catalog of safety concerns mirrored YAMADA’s complaints; PERC training, protective equipment, monitoring and procedures.
51. In early 2002 YAMADA refrained from complaining about PERC because of a perception of growing supervisor hostility. He recalled that around February 2002 Souza said to him that, “You gotta watch what you say about the PERC because its bringing a lot of heat on us.” And “I don’t (know) why but Britt’s out to get you. What did you do to Britt? Everybody knows.” Souza denies making such a statement.
52. On March 13, 2002, YAMADA was scheduled to work at 4:00 a.m. YAMADA failed to report and did not notify his supervisor until three hours later. An Advisory Notice indicating Suspension, dated March 14, 2002, states:

On March 13, 2002, Vernon was scheduled to report for work at 4:00 a.m. Vernon failed to report as scheduled and did not notify his supervisor four hours prior to his shift. Vernon is placed on suspension pending full investigation as this relates to prior advisory notices. As part of the investigation we are asking Vernon for a written statement regarding this incident. R's Ex. 32.

53. On March 14, 2002, YAMADA submitted a Voluntary Statement which states:

I woke up at 6:15 a.m. Check (sic) to see why my alarm didn't sound off found my battery on my cell phone was dead which I set my alarm on. As I drove to work with my cell phone charging I called laundry to see how everything was going (as soon as it got enough power to call out). Molly answered from laundry and said John and Mack are here in laundry. I told Molly to tell John that I'm on my way down because I woke up late. As I hung up my cell phone message alarm went on it was John checking to see if I was coming (sic) in. Time was now 6:32 and I had passed the airport. I called Britt (sic) office to speak with him but had his voice mail so nearing Four Seasons I decided to talk to Britt in person which I did on 3-12-02. R's Ex. 33.

54. FSRH General Manager Horrigan reviewed Tuscher and Glowania's recommendation to terminate YAMADA for cause, consistent with her regular practice to make the final determination on whether to approve all terminations for cause. Horrigan considered mitigating factors including the fact that YAMADA was an original employee hired when FSRH opened; that his work record in the past was good; and his length of service. She saw no indication that YAMADA ever raised any safety concerns, much less having been disciplined for them. Horrigan determined that he was disciplined and counseled for violation of safety rules which he was responsible for following. She also understood that YAMADA was going through personal problems. Tuscher had recommended that he go to the EAP for the problems. Horrigan felt that everything had been done to help YAMADA correct the performance problems but that he had not responded. Horrigan determined that based on the totality of his work performance and attendance record his termination was justified. R's Ex. 36.
55. On March 18, 2002, YAMADA was terminated from employment. The Advisory Notice indicated it was a Dismissal, and stated:

During the past several months Vernon has been counseled on his poor work performance. This includes issues of attendance, schedules, safety and quality of work. Efforts have been made to assist Vernon to improve his performance including referral to the Employee Assistance Program. We have previously given Vernon notice that his performance must improve and that any further incidents would result in termination. On March 13, 2002 Vernon was scheduled to report to work at 4:00 a.m. Vernon failed to report to work as scheduled and did not notify his supervisor until three hours later. This, along with prior advisory notices, has led to termination of his employment. R's Ex. 1.

56. On or about May 10, 2002, YAMADA filed a complaint with HIOSH alleging that he was discriminated against by FSRH because of his safety and health complaints. After investigating YAMADA's complaint, on or about October 18, 2002, HIOSH issued its findings that the evidence failed to support YAMADA's claim that he was terminated for safety and health complaints because there was a period where he did not continue to express his safety concerns. In addition, the evidence supported the employer's claims that he was terminated for a policy infraction. Further, YAMADA was unable to prove his claim that he was treated disparately. HIOSH found that the evidence supported management's finding that he had excessive absences, excessive tardiness, insubordination and safety violations. R's Ex. 84.
57. YAMADA filed an appeal with HIOSH on December 17, 2002 which was transmitted to the Board on January 21, 2003.

DISCUSSION

YAMADA asserts that his termination was discriminatory retaliation for making complaints about the hazardous conditions present in the FSRH laundry caused by the employer's failure to establish proper procedures to contain PERC. Any such retaliatory discrimination, if established, would constitute a violation of HRS § 396-8(e).¹ His initial

¹HRS ' 396-8(e), Employee responsibility and rights, provides:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

(3) No person shall discharge or in any manner discriminate

complaint having been denied by the Director, YAMADA now appeals to the Board pursuant to HRS § 396-11(e).² FSRH asserts that YAMADA was terminated for poor work performance and attendance and not because of complaints by YAMADA about PERC.

In reviewing claims such as this in which there are proffered competing rationales for adverse employment action following a complaint or other exercise of protected activity, the Board has adopted and applied the standard applicable to similar discrimination claims in the federal courts:

Courts have adopted the shifting burden of proof applicable in pretext cases to Section 11(c) retaliation claims. The Secretary bears the initial burden of demonstrating: (1) that an employee engaged in protected activity, (2) that the employee suffered an adverse employment action, and (3) that there was a causal nexus between the protected activity and the adverse action. Causation may be inferred from circumstantial evidence. The

against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;

²HRS ' 396-11(e) provides:

(e) Any employee or representative of employees may file a notice of contest of an order of the director denying a complaint of discrimination filed by an employee pursuant to section 396-8(e); provided that in each case the notice is filed within twenty days after receipt of the order by the employee.

burden then shifts to the employer to proffer a permissive, nondiscriminatory reason for the employment action. Finally, the Secretary must demonstrate that the employer's reason is merely a pretext for discrimination.

Rabinowitz, Occupational Safety and Health Law, 1999 Cumulative Supplement, 400 (BNA Books 1999) (footnotes omitted.) This being a pro se contest of the Director's denial of his claim, YAMADA bears the burdens of proof consigned to the Secretary of Labor in the above quote.

In Decision No.2, Kay Miura (Miura), Case No. 2002-16, dated October 4, 2002, the Board discussed the burden of proof and stated:

The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

Section 396-8, HRS provides in part:

- (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
 -
 - (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;

The burden of proof is the Director's and/or Complainant to establish by a preponderance of evidence³ a prima facie case of discrimination.

³The Director/Complainant have the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as "that quantum of evidence which is sufficient

“Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer’s knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision.” Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994).

In Jim Skellington, Case No. OSAB 97-015 (2001), the Board stated:

[O]nce the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to articulate a legitimate, nonretaliatory explanation for its decision. If the defendant carries this burden satisfactorily, the burden shifts back to the plaintiff to show that the alleged explanation is a pretext for impermissible retaliation.

In Miura, supra, the Board stated that respondent’s burden was to show that it would have reached the same decision even in the absence of the protected conduct.

Assuming arguendo, a prima facie case of discrimination the burden shifts to Respondent “to articulate a legitimate, nonretaliatory explanation for its decision.” Similarly, the Director asserts assuming arguendo the protected activity was a

to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false.” Ultimate Distribution Systems, Inc., 1982 OSHD ' 26.011 (1982).

substantial factor in the Respondent's decision to terminate Complainant, then the burden shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Marshall v. Commonwealth Aquarium, 469 F. Supp. 690, 692 (Mass. 1979). If the [Respondent] carries this burden satisfactorily, the burden shifts back to the [Director/Complainant] to show that the alleged explanation is a pretext for impermissible retaliation. Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994).

Protected Activity

"Employees are protected when they complain to their employers about safety or health conditions. To be protected, such employee complaints must be made in good faith; but employees are protected even if their concerns prove to be unwarranted." Rabinowitz, Occupational Safety and Health Law, p. 666 (BNA Books 1989) (footnotes omitted.)

PERC is a liquid chemical solvent used in connection with dry cleaning. Its MSDS contains the following "Emergency Overview:"

Colorless liquid. Irritating Odor. Toxic fumes released in fire situations. Causes skin irritations. Harmful if inhaled. Can cause death if too much is breathed. Clear all personnel from area. Wear full protective equipment. Contain liquid to prevent contamination of soil, surface water or ground water.

R's Ex. 60. YAMADA testified that the job he held prior to his hiring at FSRH required him to work with PERC and that he had received training there in its hazards, management and handling. Upon being hired at FSRH and assigned to laundry valet departments in 1996 he observed deficiencies in safety precautions regarding PERC and began working with Ken Finnegan, the then chief engineer, and Dennis Chaffer, the then assistant laundry manager, to research appropriate precautions and procedures. Upon Tuscher's assuming the job of chief engineer in 1998, YAMADA was assigned as laundry mechanic, the only mechanic assigned full time to the laundry and accordingly the employee most exposed to, and required to handle PERC.

YAMADA testified that upon assuming the job, he took his concerns about PERC safety to Tuscher and Souza beginning in 1998. He claims that he complained to them about 1) the lack of policies, procedures and training, 2) the absence of pumps or personal protective equipment, and 3) the lack of monitoring devices to detect any hazard. YAMADA testified that these deficiencies exposed him directly to dangerous conditions. For example, his job required him to transfer PERC from a 55 gallon drum to a dry cleaning machine

periodically throughout the year. The lack of a proper pump necessitated his starting the siphoning the chemical by sucking on a pipe. And his lack of personal protective equipment necessitated his jury rigging gear with plastic bags. YAMADA says these complaints together with corresponding requests for the purchase of necessary equipment were repeatedly ignored, denied or deferred by Tuscher, who allegedly observed the danger and exposure.

YAMADA says he took his concerns regarding PERC safety to Birchfield, who advised YAMADA to continue to work with his supervisors. Birchfield actively intervened around the Spring of 2000. She independently conducted her own research to confirm YAMADA's concerns and took her conclusions, which mirrored YAMADA's, to Souza. She also communicated YAMADA's PERC concerns to her manager, Amy Conroy. While Birchfield did not see Tuscher about safety concerns with PERC, she spoke with Souza, who acknowledged that YAMADA had come to him about PERC. During the course of the next year she periodically asked Souza about the progress of the PERC safety program. She received no positive response except for Souza's saying three or four times, "Oh Vernon again."

Birchfield wrote a memo, dated June 21, 2001, to Melody Mahiko and left it in the employee suggestion box. The paragraph entitled Perchloroethylene Program reads as follows:

Also concerned that there is no written program to support training for exposed employees (Laundry & Engineering), including of-site response team (Engineering & Security) that may be asked to do an initial survey to identify a potential spill hazard. Storage of drums and used filters as been addressed as a concern outside Laundry (closely stacked with other non-hazardous materials and combustibles, employee traffic and blocked access to the drums). This is a serious hazard that could threaten physical harm, and due to the chemical, pose imminent danger.

R's Ex. 89.

Birchfield's testimony mirrored and confirmed YAMADA's chronology and representations so far as she was involved. Being without interest in the outcome of the case, her testimony, and therefore YAMADA's corresponding representation are credited and the Board concludes that YAMADA engaged in protected activity by complaining to FSRH about the hazards of PERC beginning in 1998 through 2001, which led to FSRH addressing the hazards of PERC in the Marsh Action Plan 2000.

Accordingly, the Board concludes YAMADA easily satisfied two elements towards establishing a prima facie case of discrimination by complaining to his employer about his perceived hazards regarding PERC and suggesting training and equipment to address the health and safety concerns for the period between 1998 and 2001, which occurred some time before his termination on March 18, 2002.

Nexus & Respondent's Legitimate, Nondiscriminatory Explanation

YAMADA asserts that his complaints concerning PERC over a period of three years was the reason for his termination on March 18, 2002. The Board majority disagrees. The weight of the circumstantial evidence and the proximity of time simply does not support even an inference of a causal link.

YAMADA's complaints spanned a period of over three years beginning in 1998 when he initially raised his concerns about the hazards of PERC with his supervisors Tuscher and Souza. In October 1999, frustrated with his lack of progress, YAMADA took his concerns regarding PERC safety to Birchfield who advised YAMADA to continue to work with his supervisors, and then actively intervened. In any event, Birchfield and YAMADA persevered.

Birchfield brought YAMADA's safety concerns to Marsh Company representatives who were conducting an audit of risk management at FSRH on or about December 4, 5, and 6, 2000. This resulted in the Marsh Company's report which included recommendations on PERC. In the Spring of 2001 Birchfield communicated YAMADA's concerns to her supervisor Amy Conroy and the FSRH Planning Committee, which both Tuscher and Conroy were members of, and which was in the process of preparing responses to the annual safety audit conducted by the Marsh Company. Conroy assured Birchfield that the PERC concerns were communicated to the planning committee. On March 8, 2001, Birchfield submitted a Safety Program Proposal listing tasks, departments, requirements and training comments with respect to the Marsh recommendations, including recommendations related to PERC. On March 12, 2001, the Planning Committee prepared the Marsh Action Plan 2000 which listed concerns, action/correction, persons and dates with respect to the Marsh recommendations, including the recommendations relating to PERC. R's Ex. 46. Consequently, YAMADA attended both the manufacturer's PERC training on July 5, 2001, and FSRH's PERC procedures training on July 27, 2001.

Problems regarding YAMADA's attendance began to occur in June of 2000. On July 10, 2001 Souza issued a "verbal warning" to YAMADA for his excessive absenteeism covering sick days (September 27-28, December 4-12, 2000 and April 23, 2001) and car trouble on two occasions (January 30 and July 10, 2001). On May 28, 2001, FSRH issued its revised policy on excessive absenteeism. YAMADA then received a written verbal warning for reporting late on July 20, 2001 because he overslept. On July 31, 2001, YAMADA was not clean shaven when he appeared for work and was counseled by Tuscher

as to the grooming policy. By an Advisory Notice dated October 10, 2001 YAMADA was issued a verbal warning on excessive absenteeism and advised that future incidents would result in progressive disciplinary action. The attendance chart attached recorded tardies on July 20, 2001, September 19, 2001, and October 10, 2001.

On October 12, 2001, YAMADA was issued a Final Written Warning over discrepancies in his work and attendance. This final warning was clear and unequivocal, i.e., “Any further violations of any nature will result in termination of employment. Vernon has been advised that a marked improvement in performance is needed ASAP. Vernon is to keep a (sic) accurate account for his time in the Log book.” R’s Ex. 21.

Approximately five months after receiving this final written warning, on March 13, 2002, YAMADA who was scheduled to work at 4:00 a.m., failed to report and did not notify his supervisor until three hours later. Consequently, YAMADA was suspended pending an investigation. Based on this incident, both Tuscher and Glowania recommended that YAMADA be terminated for cause to FSRH’s General Manager Horrigan.

FSRH General Manager Horrigan reviewed Tuscher and Glowania’s recommendation to terminate YAMADA for cause, consistent with her regular practice to make the final determination on whether to approve all terminations for cause. Horrigan considered mitigating factors including the fact that YAMADA was an original employee hired when FSRH opened; that his work record in the past was good; and his length of service. She saw no indication that YAMADA ever raised any safety concerns, much less having been disciplined for them. Horrigan determined that he was disciplined and counseled for violation of safety rules which he was responsible for following. She also understood that YAMADA was going through personal problems. Tuscher had recommended that he go to the EAP for the problems. Horrigan felt that everything had been done to help YAMADA correct his performance problems but that he had not responded. Horrigan determined that based on the totality of his work performance and attendance record his termination was justified. R’s Ex. 36.

The Board is not convinced that the weight of the circumstantial evidence supports an inference of a causal link between YAMADA’s complaints of PERC and his termination. The Board is persuaded by the fact that not only did Horrigan make the final determination based on an independent review of YAMADA’s work performance and attendance record, but there is nothing in the record to show that she was made aware of YAMADA’s complaints of PERC. Accordingly, the Board concludes that YAMADA failed to establish a prima facie case of discrimination for engaging in protected activity.

Assuming arguendo, YAMADA established a prima facie case of discrimination based on his testimony that he refrained from complaining about PERC because of growing supervisor hostility by Tuscher as communicated to him by Souza in early February of 2002, which occurred one month prior to his termination, Respondent

FSRH met its burden to show by a preponderance of evidence a legitimate business reason for the termination.

Since all recommendations for termination for cause were reviewed and approved by Horrigan, as FSRH's General Manager, the Board concludes that her final determination approving the recommendation by Tuscher and Glowania, sets forth a legitimate, nonretaliatory explanation for YAMADA's dismissal. The reasons were articulated in an Advisory Notice to YAMADA dated March 18, 2002, that referenced his poor work performance, issues of his attendance, schedules, safety and quality of work. Finally, YAMADA received a final written warning approximately five months prior to reporting to work late on March 13, 2002, which led to his dismissal. On this basis, the Board concludes that Respondent FSRH established by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

Pretext

Assuming arguendo, that YAMADA established a prima facie case of discrimination and FSRH carried its burden in establishing its legitimate business reason for YAMADA's termination, the burden would shift to YAMADA to prove that his employer's reasons for his dismissal were just a pretext for discrimination. YAMADA claims that the documented reasons for his termination were a set-up or fabricated by Tuscher in retaliation for his PERC complaints.

Attendance. YAMADA does not dispute any incidences of the documented attendance violations. He however asserts that Tuscher knowingly manipulated his schedule in retaliation for his complaints. YAMADA testified that prior to his attendance problems Tuscher assigned him to YAMADA's preferred 11:30 p.m. to 7:30 a.m. shift.⁴ YAMADA said this was the preferred schedule for the overnight repair and preventive maintenance of the laundry equipment while leaving him time to care for his children during the day. YAMADA claims that around the time he went to Birchfield, Tuscher arbitrarily and unilaterally changed his schedule to 4 a.m. - 12 p.m., a schedule that YAMADA claims Tuscher knew was the worst thing for him. Although YAMADA testified that Tuscher claimed that the change was made so that YAMADA could work along with the laundry staff, he believed that the fluctuating schedule contributed to his tardiness.

YAMADA argues that notwithstanding the admitted incidences of tardiness, FSRH could not justify his termination because the occurrences did not exceed the FSRH absenteeism policy then in place. With regard to this claim Tuscher testified that the termination was not a result of attendance alone, but was based on work performance, of which attendance, and YAMADA's tendency to make up his own schedule, were a part.

⁴Contrary to YAMADA's assertions, the record indicates that he was also tardy in mid 2000 when he was scheduled to start work at 11:30 p.m.

Work Performance. YAMADA almost categorically denies every incidence of work performance deficiency documented by FSRH. He claims to have reported to Souza every time he found a safety switch overridden and denies having been reminded or reprimanded in this regard. YAMADA denies that he was responsible for the conditions identified and documented in Tuscher's October 3, 2001 inspection and accuses Tuscher of manufacturing the photographic evidence. He claims that the retrofit kit was purchased at the manufacturer's recommendation and that Tuscher approved the substitution. YAMADA claims he was working in slippers because the locker room was inaccessible due to floor waxing. YAMADA never observed the panels allegedly left unlocked on October 16, 2001 and the butter knife was not there or used during his shift and was more likely left on top of the washer by valets who routinely accidentally left dishes or kitchen utensils among returned items to be laundered. YAMADA further claims that there were no incorrect bolts on the laundry spreader.

YAMADA argues that these manufactured complaints were all part of a conspiracy between Tuscher and Souza to get rid of him because they knew his PERC complaints made him a liability. He claims that they were all friends until he went to Birchfield at which time it all changed and Tuscher began a pattern beginning with verbal abuse and culminating with termination.

Notwithstanding concerns about Tuscher's credibility, the Board majority would conclude that YAMADA failed to carry his burden of proof regarding the pretextual nature of FSRH's nondiscriminatory reasons for his termination. The number of tardies and work performance deficiencies, and accompanying progressive discipline are undenied. This includes the termination-precipitating four-hour-without-notice lateness on March 13, 2002 which occurred after the receipt of the October 12, 2001 advisory that, "Any further violations of any nature will result in termination of employment." R's Ex. 21.

YAMADA's theory requires the Board to find that Tuscher's advisories and Souza's corroborations were largely falsifications, a product of a conspiracy to get him to keep quiet about PERC or face termination. YAMADA took absolutely no responsibility for the documented work performance failings. But YAMADA's testimony and evidence contain little to support complicity on the part of Souza. And according to Horrigan, YAMADA did not raise the possibility of any such conspiracy arising from his safety concerns. The Board found Souza and Horrigan credible and accordingly credits their testimony and documentation of the attendance and performance problems personally observed or documented to their satisfaction. These work performance problems, together with the admitted attendance problems support their nondiscriminatory basis for the adverse personnel action and defeats YAMADA's burden of proving pretext.

Accordingly, based on the foregoing, YAMADA's contest is dismissed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-8.
2. Complainant failed to prove by a preponderance of evidence all the elements of a prima facie case of discrimination for engaging in protected activity by complaining about the hazards of PERC under HRS Chapter 396.
3. Complainant failed to prove by a preponderance of evidence a causal link between his engaging in protected activity spanning a period of years from 1998 to 2001, i.e., complaints of PERC safety and Respondent's decision of March 18, 2002 to terminate Complainant.
4. The Respondent proved by a preponderance of evidence that it had legitimate, nonretaliatory reasons for terminating Complainant and that the decision to terminate Complainant was made due to Complainant's work performance and attendance problems. Respondent also proved by a preponderance of evidence that it would have reached the same decision even in the absence of protected conduct.
5. The Board concludes that Complainant was not terminated for participating in protected activity under HRS ' 396-8(e) for raising his PERC safety concerns.
6. The Board concludes that Respondent did not terminate Complainant in violation of HRS § 396-8(e).

ORDER

The Board hereby dismisses the instant contest.

DATED: Honolulu, Hawaii, April 21, 2004.

HAWAII LABOR RELATIONS BOARD

/s/CHESTER C. KUNITAKE

CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH

KATHLEEN RACUYA-MARKRICH, Member

DISSENTING OPINION

In a very close call, I must dissent.

VERNON YAMADA was apparently an exemplary FSRH employee for over five years. From his hire in 1996 until June of 2000 he had no documented attendance problems. It was in the Spring of 2000, when YAMADA first asked Helene Birchfield to assist him in resolving his PERC safety concerns, that he says his schedule was changed and attendance problems first arose. In my view, the concurrence could have been more than coincidental.

The first significant performance failures were documented on October 3, 2001. All advisory notices relating to performance were issued exclusively during that month. The results of the Marsh safety audit identifying PERC safety concerns, and essentially ratifying YAMADA's complaints were also issued during that month. The concurrence could have been more than coincidental.

Tuscher was YAMADA's supervisor, direct accuser and the principal agent of his termination. Tuscher denied any knowledge of YAMADA's PERC concerns or the existence of any hazardous conditions. But Birchfield corroborated YAMADA's expression of concern and the Marsh report seems to corroborate the existence of the complained of conditions. This leads me to disbelieve Tuscher's denial of knowledge and suspect his motivation for fabrication.

In his testimony Tuscher 1) denied any knowledge of YAMADA's concerns or complaints regarding PERC; 2) denied receiving or denying YAMADA's requests for training and written procedures; 3) denied receiving or denying YAMADA's requests for the purchase of personal protective equipment or monitoring and handling equipment; 4) denied any knowledge of YAMADA's taking PERC safety concerns to Birchfield; 5) denied knowledge of Birchfield's communication of YAMADA's concerns; and 6) denied knowledge or the existence of any PERC related hazards during YAMADA's tenure at FSRH. Tuscher's denials, at the very least, strain credulity in light of the crediting of Birchfield's corroborating testimony.

Events subsequent to Birchfield's communication of YAMADA's concerns further undermines Tuscher's claims of ignorance. In the Spring of 2001 Birchfield communicated YAMADA's concerns to her supervisor Amy Conroy and the FSRH planning committee, of which both Tuscher and Conroy were members, which was in the process of preparing responses to the annual safety audit conducted by their safety consultant, the Marsh Company. Although Conroy assured Birchfield that the PERC concerns were communicated to the planning committee, Tuscher denies any recollection of the communication even though PERC safety fell within his immediate area of responsibility. In response to Birchfield's suggestion box memorialization of PERC concerns on July 26, 2001, Director of Human Resources Therese Glowania, wrote that with respect to PERC, "We expect this

program being in place by month-end with in-house training scheduled for 7/26-7/27/01.” R’s Ex. 90. In his testimony, Tuscher initially denied seeing the Birchfield suggestion box communication, and upon counsel-refreshed recollection of it, denied any reaction. The FSRH subsequently conducted its first ever Perchloroethylene training” courses on July 26, 2001 and August 8, 2001.

As Director of Engineering for FSRH, Tuscher was part of the management team sitting on the Hotel’s planning committee to which Birchfield’s memo was forwarded and which was responsible for responding to the Marsh audit. Tuscher was the manager principally responsible for PERC. But despite the prominence of PERC in the Marsh audit, Tuscher claimed no concern regarding the hazard, or how the identification of the hazard would reflect upon him professionally. I find this unlikely and that it is more likely that such concerns and their nexus with YAMADA’s complaints led to his failure to follow-up on the Marsh identified PERC concerns with YAMADA, even though YAMADA was the FSRH employee most directly exposed to any PERC hazard. Any disclosure of YAMADA’s previous complaints and Tuscher’s failure to act would have exacerbated any professional conduct concerns generated by the Marsh report.

The tipping point in the documentation of YAMADA’s alleged performance deficiencies occurred pursuant to Tuscher’s October 3, 2001 inspection of the laundry. He said that on that morning he was up early and decided to go in and do some work. Upon being in the laundry he observed the identified deficiencies including some that presented imminent danger, photographed them, and went to his office to e-mail Souza. The e-mail identifies 3:50 a.m. as its time of composition. YAMADA was scheduled to start work at 4:00 a.m., yet Tuscher did not thereafter confront or advise YAMADA directly of his findings.

Tuscher serendipitously visited the laundry at around 3:50 a.m., camera in hand, and discovered and documented dangerous conditions. He went back to his office and advised Souza via e-mail of the conditions, concluding that “Vernon should be counseled and disciplinary action taken.” And, “In short is performance is unacceptable.” Tuscher reached these conclusions without YAMADA’s having an opportunity to respond to his findings even though YAMADA would be arriving ten minutes later. He did not confront YAMADA and demand remediation even though there allegedly existed imminent danger. He unequivocally concluded that the conditions were YAMADA’s fault even though they were discovered about 16 hours after YAMADA’s last shift had finished and up to 36 engineers and other laundry personnel had access to the equipment in the interim. In testimony, when asked about this behavior and the formation of his conclusions, Tuscher guessed he was a “bad boss.” Tuscher’s conduct is at least curious.

This curiosity is multiplied by the fact that this early morning inspection was Tuscher’s second in three days. In the October 21, 2001 “final written warning” that advised YAMADA that “Any further violations of any nature will result in termination of employment,” R’s Ex. 21, appended to the notice was a sheet listing in “incidents and

violations” including, “On October 1, Brit came in early and did an inspection of the laundry and discovered Vernon working wearing slippers.”

So apparently two days earlier Tuscher conducted an inspection with Yamada present and documented no other deficiencies expect for the slippers. Two days later, in Yamada’s absence, a plethora of problems were discovered, photographed and used as a foundation for termination. This, coupled with possible motivation, at very least, casts doubt on his findings.

The admitted attendance problems and a probable reduction in performance due to admitted personal problems might buttress the hotel’s argument. But I would conclude that the groundless denials of knowledge by Tuscher, coupled with the probable motivation of hiding his inactivity regarding PERC and his curious conduct regarding the 3:50 a.m. inspection, constitute sufficient evidence to support a conclusion that the reasons for termination were pretextual and that YAMADA was a victim of discrimination based on his safety complaints.

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

NOTICE TO EMPLOYER

You are required to post a copy of this Decision at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this order to a duly recognized representative of the employees.

Copies sent to:

Vernon Yamada
Jeffrey S. Harris, Esq.
Leo B. Young, Deputy Attorney General